United States Court of Appeals

for the Second Circuit

REPLY BRIEF

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76-2006

To be argued by
PETER C. SALERNO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2006

UNITED STATES OF AMERICA *ex rel.*
BIRCHEL LEONARD CARSON,
Petitioner-Appellee,

—v.—

LARRY TAYLOR, Warden, Metropolitan Correctional Center, and JOHN T. CONNOLLY, Chief Probation Officer, Southern District of New York,
Respondents-Appellants.

B
P/s

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

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REPLY BRIEF FOR RESPONDENTS-APPELLANTS

Preliminary Statement

If appellee's arguments on this appeal were to prevail, parole revocation hearings would be transformed into full-fledged adversarial proceedings at which the parolee is afforded every right that he would be afforded at a criminal trial. This conclusion is highlighted by appellee's extensive citation of criminal cases in support of his position. Non-lawyer hearing officers would be incapable of conducting such proceedings. More importantly, the rigorous requirements sought to be imposed are totally inconsistent with the Parole Board's role of exercising broad discretion and judgment in its supervision of persons convicted of crime who are still serving a sentence imposed by a court. The appellee's arguments, and the District Court's decision, go far beyond the requirements imposed by law.

ARGUMENT

POINT I

Carson was not deprived of his rights by the board's failure to disclose various documents.

The appellee's argument on the question of the "secret" documents highlights the fallacies inherent in his position. It is significant that except for *Greene* v. *McElroy*, 360 U.S. 474 (1959), all the cases cited by appellee at pages 27-31 of his brief are criminal cases. It is conceded, and irrelevant, that the procedures employed by a parole board in revoking parole would not support a criminal conviction. As for *Greene* v. *McElroy*, it is distinguishable because all the Court held in that case was that the procedures employed by the agency in revoking the security clearance of an engineer, procedures which included apparent reliance on secret evidence, were not authorized either by statute or presidential order. Although the majority opinion by Chief Justice Warren contains strong dictum condemning the practice, Justices Frankfurter, Harlan and Whittaker expressly refused to indicate a view as to its constitutionality, 360 U.S. at 508-09, and Justice Clark dissented on the ground that the practice was both authorized and constitutional. *Id.* at 510 *et seq.*

If the procedures employed by the Board of Parole in Carson's case must be analogized to criminal procedure at all, they are best analogized to the sentencing process, at which the District Judge has discretion both as to what sentence to impose and, at least constitutionally, as to whether to disclose the pre-sentence report and other information upon which he may be relying. *Williams* v. *New York*, 337 U.S. 241 (1949); *United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950

(1974); *United States* v. *Virga*, 426 F.2d 1320 (2d Cir. 1970), *cert. denied*, 402 U.S. 930 (1971); *United States* v. *Fischer*, 381 F.2d 509 (2d Cir. 1967), *cert. denied*, 390 U.S. 973 (1968). While considerably broader rights are conferred by rule, particularly the most recent amendments to rule 32(c) of the Federal Rules of Criminal Procedure, it has been repeatedly held, in the cases cited, that the failure to disclose the contents of the presentence report does not violate the Constitution. Where the report has not been disclosed, an allegation that it contains erroneous information will not require disclosure, or an opportunity to rebut. *United States* v. *Fischer*, *supra*, 381 F.2d at 511. While an opportunity to rebut allegedly erroneous information should be afforded (under the *rules*) where the presentence report is disclosed, "Normally, verbal explanation or comment is sufficient." *United States* v. *Rosner*, *supra*, 485 F.2d at 1230. The Court in *Rosner* expressly noted that the failure to afford this opportunity was *not* a denial of due process. *Id. But cf. Townsend* v. *Burke*, 334 U.S. 736 (1948).

Carson received more than this. The contents of the documents were summarized to him, as expressly authorized by regulation,* and he rebutted them with comments.**

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* "All evidence upon which the finding of violation may be based shall be disclosed to the alleged violator at the revocation hearing. The hearing officer or examiner may disclose documentary evidence by reading or *summarizing* the appropriate document for the alleged violator." 28 C.F.R. § 2.56(e (emphasis added).

** And without demand for disclosure or further particularization. It is apparently true, as appellee notes (brief at 37 and n. 22), that in August 1975 Carson made requests for documents from various United States Probation Offices (see document #4 of the Record on appeal). These requests were made pursuant to the Freedom of Information Act, 5 U.S.C. § 552, not, as appel-

[Footnote continued on following page]

It should be remembered that Judge Frankel explicitly found that the evidence adduced at the hearing was sufficient to support all three violations found (A. 12, 403 F. Supp. at 751). The evidence in support of those violations consisted entirely of the live testimony of parole officer Berger and Carson's admission that he went to Canada without permission. Thus the documents, and the questioning of Carson based upon them, were only relevant to the Board's need to get as complete a picture as possible of Carson's behavior while on parole.

Despite appellee's contrary argument (brief at 32-34), the disclosure that was afforded Carson on the question of his entire behavior while on parole gave him a meaningful opportunity to respond.

Appellee first points to the discrepancy between parole officer Berger's statement in the hearing that Carson may have been involved in Vermont with "front men for the Mafia" (A. 73) and Berger's letter in the "secret" file to the effect that there was speculation that one of the men involved had "connections with organized crime." Appellee's counsel characterizes the latter version as "substantially less ominous." Brief at 32.

In the first place, the "less ominous" version, being a statement by Berger, was not really evidence at all, but at most a prior, slightly inconsistent statement. It has not yet been held that prior statements of witnesses must be turned over in parole revocation proceedings, as they

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lee claims, pursuant to the Privacy Act, 5 U.S.C. § 552a, whose operative provisions did not become effective until September 27, 1975, three days after Carson's hearing. The apparent failure of the addresses of those letters to respond to them is regrettable and inexplicable, but Carson was not prejudiced by it. The only reference made at the revocation hearing to these requests concerned documents reflecting Carson's employment booking bands, and Carson was not prejudiced on that point because he testified in detail about those activities (A. 82).

must be in criminal trials pursuant to 18 U.S.C. § 3500. It should also be remembered that the purpose of this testimony was merely to explain why the Parole Board had imposed a 75-mile travel restriction on Carson (A. 73), and there is no evidence whatever that the Board considered this potential involvement with criminals as a reason for revoking Carson's parole. Most importantly this discrepancy, if it can be called that, had no effect on Carson's ability to respond—he stated that he turned down the job, *admitting* that he had "learned of the nature of some of the people involved" (A. 74).

Appellee next points to Berger's statement at the hearing that the Biloxi police suspected that "moral turpitude" was behind some ads Carson was placing in newspapers (A. 77), and that similar things were apparently happening in New York (A. 79), and compares them with a letter in the "secret file" that Berger wrote concerning the ads in which he did not mention "moral turpitude" (Brief at 32). Appellee claims that the failure to disclose the latter statement rendered Carson "unable to defuse the impact of Berger's false statement." (*Id.*)

There is no evidence in the record that Berger's statement had any impact whatever, and Berger's mere failure to mention "moral turpitude" in his letter is hardly a flagrant inconsistency with his statement at the hearing. And once again, Carson responded to Berger's statement by disclaiming any "evil intent" (A. 79). Counsel is confusing the ability to make a meaningful response, which clearly must be afforded in parole revocation proceedings and was afforded to Carson, with the ability to elicit insignificant inconsistencies on cross-examination, a right which is not nearly so clear. As we have already noted, the latter proposition requires a holding that 18 U.S.C. § 3500 applies to parole revocation proceedings. Berger's letters, in which some allegedly inconsistent statements are contained, are intra-agency memoranda

which would very likely be exempt from disclosure under the Freedom of Information Act, 5 U.S.C. §552(b)(5), and in civil discovery as well. They contain non-final recommendations concerning an agency decision (*i.e.*, to issue an arrest warrant). This sort of information is exempt from disclosure to encourage unfettered candor in making intra-agency recommendations, and that policy would be seriously burdened by requiring such material to be disclosed in parole revocation proceedings.*

Appellee erroneously contends (brief at 33) that Carson could not adequately respond to allegations regarding "bum checks" because no specific instance was referred to. The record is clear that a specific instance *was* referred to, namely a check to Mr. Gill. (A. 84). Both Carson and Gill testified that the check was made good (A. 84-86). It is therefore difficult to understand in what way Carson could not "respond adequately."

Appellee completely mischaracterizes the discrepancies between what was revealed at the hearing about the lost or stolen check Carson gave to Mr. Herisko, the Massachusetts lawyer (brief at 33-34; A. 89). Here again, Carson was able to respond, in the sense contemplated by *United States* v. *Rosner*, *supra*, by saying that he did not know it was stolen. It is true that Berger's June 25 letter refers to that check as being lost, but it also notes that the endorsement of the payee, Dr. Martin Peretz, was forged. In light of that fact, the distinction between "lost" and "stolen" hardly affects the culpability of someone later coming into possession of the check, as Carson did. Either such a person knows that there is something

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* Appellee contends (footnote to brief at 34) that the Government has not claimed on this appeal that some of the documents in the "secret" file are intra-agency memoranda. This is erroneous. We respectfully refer the Court to the last sentence of the footnote to page 8 of our main brief, where the claim is explicitly made.

wrong with the check or he does not. Carson testified without contradiction that he had no knowledge of any wrongdoing and that he made good on the check (A. 89-90). Once again, there is no evidence in the record that the Parole Board found against Carson on this point.

The foregoing demonstrates how little Carson was prejudiced by the failure to disclose the entire "secret file." As evidenced by the examples cited in appellee's brief, the only effect of requiring such disclosure would be to facilitate detailed and cumbersome inquiry into the minutiae of collateral issues. Had the Parole Board explicitly concluded that Carson *had knowingly* transferred a stolen check or had deliberately written "bum checks," or was seducing young men through newspaper ads, the case would be quite different. But where the Board, in its Hearing Summary, accurately characterizes all the evidence, recognizes that there is no definite proof of certain allegations, and only notes that "there is a good possibility that he has been involved in . . . . criminal misbehavior" (see Government's main brief at 9), the Board has acted well within the confines of fairness and the discretion that is committed to it in its supervision of parolees.

In short, the alleged discrepancies were not significant in degree or in impact and Carson was fully able to respond to the substance of the non-disclosed material.

POINT II

The Parole Board stated its reasons for revoking Carson's parole, and it properly stated the evidence upon which it relied.

Appellee argues (brief at 39-45) that the Parole Board failed to state the evidence it relied on and its reasons for revoking parole. This argument is without merit.

Appellee concedes (brief at 40) that as to one of the violations found, Carson's unauthorized trip to Canada, the Board recited that it was relying on Carson's admission to that effect (A. 54). Appellee apparently believes that as to the other two violations, failure to submit a supervision report and failure to report a change in address, the Board was required to recite, for example, that it was relying on Berger's testimony that he had not received the supervision report or the notification of change in address.

Due process does not require nearly such formality. Although *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), does require a statement of "the evidence relied on," *id.* at 489, this Court's decision in *United States ex rel. Johnson* v. *New York State Board of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974), makes it clear that the Board must state the *facts* which it has found and upon which it is relying ,not necessarily what testimony it is relying on to establish those facts. See 500 F.2d at 934. As we have noted several times, Judge Frankel himself found, and it could hardly be disputed, that there was adequate evidence in the record to support the Board's finding of the three violations (A. 12; 403 F. Supp. at 751).*

The reasons given for continuing Carson to the expiration of his sentence were plainly adequate. In stressing what he claims is the meaninglessness of some of the "boilerplate" language used, appellee ignores the remainder of the decision given to Carson, which reflects the Board's prediction that he would not comply with parole

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* Even if appellee is correct on this point, the remedy should be to remand the case to the Board for more specific findings, not to grant the writ of habeas corpus. *Cf. Lemelson* v. *Kellogg Co.*, 440 F.2d 986, 988 (2d Cir. 1971) (remand for findings of fact in compliance with Fed. R. Civ. P. 52(b)).

restrictions based upon the three proved violations (A. 54; see Government's main brief at 21-22). This statement fully complied with this Court's decisions in *Johnson, supra, Haymes* v. *Regan*, 525 F.2d 540 (2d Cir. 1975), and *Cardaropoli* v. *Norton*, 523 F.2d 990 (2d Cir. 1975). The facts in those cases are much different from the instant case, in that in each of them the petitioner was literally given no reason for the agency's decision. In *Haymes*, for example, the decision merely said "held to 7/75 Board with improved record." 525 F.2d at 542. Carson received much more than that here.

Furthermore, the boilerplate "depreciate the seriousness" language has a recognized meaning in the context of the decision to grant or deny parole—it means that the inmate's offense was serious and release at a particular time would belittle it—and that language, when accompanied by additional commentary as Carson's decision was, has been held adequate to support a parole board decision. *United States ex rel. Richerson* v. *Wolff*, 525 F.2d 797, 802-03 (7th Cir. 1975). In the parole revocation context, it clearly means that Carson's cavalier attitude toward parole restrictions belittled their importance (A. 146-47). The "boilerplate," coupled with the explicit reference to Carson's failure to abide by parole restrictions, adequately informed him and the Court reviewing the Board's decision of the reasons for reincarceration.

POINT III

The Board properly found that Carson had committed the two violations originally charged and the one he had admitted.

At pages 46-50 of his brief, Carson argues that, despite the clear language of the Parole Board's decision (A. 54), he was *not* found to have committed the two violations originally charged, but some other violations,

and that it was improper to find that he committed a parole violation that he admitted at the hearing. Both these arguments have no merit whatever. That they are even made is particularly surprising in light of the fact that the District Court did not consider them, and in fact stated that "Had here been a fair hearing, the Court would probably conclude that there is sufficient evidence in the record to support the Board's finding that petitioner violated certain conditions of his mandatory release" (A. 12). The District Court had before it the Hearing Summary upon which Carson relies in making some of the above arguments.

Concerning the first violation charged and found, that of failure to submit a supervision report, Carson now claims, by misinterpreting language in the Hearing Summary, that he was really found guilty of failing to submit the report on the proper form, or failing to come to the parole office (brief at 49).

The language quoted from the Hearing Summary, plus related language not quoted (see pages 1-2 of the Hearing Summary), does not lend itself to any such interpretation. Rather, the panel felt that Carson's failure to receive the proper form was no excuse for not filing a report. Carson himself no doubt recognized this, since he claimed to have written a letter despite not having received the form. The Hearing Summary specifically notes parole officer Berger's testimony that he never received the letter, and that is an ample basis for concluding that Carson committed the violation by not making sure that the letter was received before he left town. It is also possible, of course, that the letter was never mailed, and the Board could have so found.

As to the second violation charged and found, that of failure to report a change in address, appellee claims that the Hearing Summary reveals that he was really found guilty of failure to "formally seek permission to report

a change in residence . . ." (brief at 50). While it is true, as appellee contends, that the language immediately preceding this statement in the Hearing Summary focuses on whether Carson had permission to leave the jurisdiction, it must be remembered that Carson's only claim of notification of change in address was contained in the letter referred to above, which the Parole Board never received. At the time Carson's violator wararnt was issued, the Board had no idea where he was, and it was therefore at that time incontestably true that he had failed to report a change in residence. Viewed in this light, the Board's discussion of whether or not Carson reasonably assumed he had blanket permission to travel was merely an attempt to give him the benefit of the doubt. If Carson's belief had been reasonable, or if he had in fact had blanket permission, perhaps the Board would have excused the failure to report a change in residence. The belief was not reasonable, because Carson was clearly told that he could not travel beyond a 75-mile radius of New York City without written permission of the Parole Board (A. 73), and because he himself admitted that on all other trips he had received *specific* permission (A. 71-72, 74).

This latter fact negates Carson's claim (brief at 50) that he was entitled to cross-examine parole officer Berger's supervisor as to how the 75-mile restriction came about, and as to how Carson was notified of it. Berger's own testimony was clear on both points (though how the restriction came about is plainly irrelevant, as long as Carson had knowledge of it and disobeyed it). Carson was told of the 75-mile limitation in an office visit of May 8, 1975, and he accepted it "without argument" (A. 73). The reasons for imposing it included the questionable nature of Carson's potential associates in a venture in Vermont (*id.*).

Carson's contention that due process was violated by the addition, without notice, of the violation that he went to Canada without permission, ignores the plain recognition in the cases that once some violations are established, the Parole Board has a right "to know accurately how many and how serious the violations were." *Morrissey* v. *Brewer*, 408 U.S. at 480. *Accord*, *Latta* v. *Fitzharris*, 521 F.2d 246, 252 (9th Cir. 1975); *United States* v. *Winsett*, 518 F.2d 51, 55 (9th Cir. 1975). The only way this can be done, without continually bifurcating or adjourning parole revocation proceedings, is to allow the Parole Board to consider additional violations as they are proved at the hearing.

Contrary to the implications in his brief (at pp. 47-48), Carson was not prejudiced by the addition of the third charge, since he could and did meet it with his own testimony that he was looking for work in Canada and thought he had blanket permission to go there (A. 75). The Board plainly, and properly, considered Carson's argument of supposed necessity irrelevant in view of the fact that he did not have permission to make the trip (*id.*).

CONCLUSION

The Government's responses to the remaining points in appellee's brief are fully set forth in our main brief, and we will not reiterate them here. We do reiterate that in every particular, as well as when viewed overall, Carson's parole revocation proceedings were fair and complied with the requirements of due process. There was ample evidence to support the finding of three parole violations, and ample basis to reincarcerate Carson based upon those violations. That basis was plainly revealed to him. The District Court's decision releasing him should be reversed.

Respectfully submitted,

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